Nos. 17-586 and 17-626

# In the Supreme Court of the United States

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL., APPELLANTS

*v.*

SHANNON PEREZ, ET AL.

*ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS*

## BRIEF FOR THE UNITED STATES AS APPELLEE IN SUPPORT OF APPELLANTS


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## QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether this Court may exercise jurisdiction over these appeals.

2. Whether the district court erred in concluding that the Texas Legislature acted with a racially discriminatory purpose in adopting districts in its 2013 congressional and State House plans that the district court had included in its own 2012 interim redistricting plans and had provisionally determined were not unlawful.

3. Whether the district court erred in concluding that Congressional District 35 in the 2013 congressional plan violated the Equal Protection Clause of the Fourteenth Amendment.

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*ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS*

**BRIEF FOR THE UNITED STATES AS APPELLEE IN SUPPORT OF APPELLANTS**

## OPINIONS BELOW

In No. 17-586, the district court's order on Texas's 2013 congressional redistricting plan (Plan C235) (C.J.S. App. 3a-119a)[1] is reported at 274 F. Supp. 3d 624. That order incorporates the court's prior opinion on the 2011 congressional redistricting plan (Plan C185) (C.J.S. App. 120a-366a; see C.J.S. App. 14a n.13), which is reported at 253 F. Supp. 3d 864.

In No. 17-626, the district court's order on Texas's 2013 State House redistricting plan (Plan H358) (H.J.S. App. 3a-87a) is reported at 267 F. Supp. 3d 751. That order incorporates the court's prior opinion on the 2011 State House redistricting plan (Plan H283) (H.J.S. App. 88a-299a; see H.J.S. App. 7a n.5), which is reported at 250 F. Supp. 3d 123.

[1] Citations to "C.J.S." refer to filings in No. 17-586, while citations to "H.J.S." refer to filings in No. 17-626.

## JURISDICTION

In No. 17-586, the order of the district court was entered on August 15, 2017. Appellants filed their notice of appeal on August 18, 2017 (C.J.S. App. 1a-2a). In No. 17-626, the order of the district court was entered on August 24, 2017. Appellants filed their notice of appeal on August 28, 2017 (H.J.S. App. 1a-2a). Appellants invoke this Court's jurisdiction under 28 U.S.C. 1253. This Court has postponed further consideration of the question of jurisdiction pending a hearing on the merits.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the appendices to the jurisdictional statements. See C.J.S. App. 426a-428a; H.J.S. App. 437a-439a.

## STATEMENT

These appeals concern redistricting plans enacted by the Texas Legislature in 2013 for the State's House of Representatives (the State House plan) and for the State's Representatives in the United States House of Representatives (the congressional plan). The 2013 plans were based, entirely or almost entirely, on interim remedial plans that a three-judge court of the District Court for the Western District of Texas adopted in 2012, after that court had enjoined use of the Legislature's prior 2011 redistricting plans pending separate preclearance proceedings in the District Court for the District of Columbia. In the decisions under review, the district court invalidated several districts in the 2013 congressional and State House plans on the grounds that they were intentionally discriminatory, were racially gerrymandered, or caused unlawful vote dilution

in violation of the Equal Protection Clause of the Fourteenth Amendment or the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 *et seq.* (Supp. III 2015).[2]

The United States intervened in the Texas district court to assert claims that the 2011 plans were enacted with racially discriminatory intent in violation of Section 2 of the VRA, 52 U.S.C. 10301. The United States has not brought any claims challenging the 2013 congressional or State House plans. The United States nonetheless retains a significant interest in these appeals because the United States, through the Attorney General, has primary responsibility for enforcing the VRA. See 52 U.S.C. 10308(d). Accordingly, the United States has a substantial interest in the proper interpretation of the VRA and the related constitutional protection against the unjustified use of race in redistricting.

1. "[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe* v. *Emison*, 507 U.S. 25, 34 (1993). States have substantial discretion to make the judgments and compromises necessary to balance the complex array of "competing interests" involved in redistricting. *Miller* v. *Johnson*, 515 U.S. 900, 915 (1995). At the same time, both the Constitution and federal statutes impose constraints on redistricting in order to prevent racial discrimination.

a. Section 2 of the VRA imposes a "permanent, nationwide ban on racial discrimination in voting." *Shelby County* v. *Holder*, 133 S. Ct. 2612, 2631 (2013). Section 2 prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of

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[2] All references to Sections of the VRA are found in the 2015 Supplement of the United States Code.

the United States to vote on account of race or color." 52 U.S.C. 10301(a). As amended in 1982, Section 2 provides that a violation may be "established if, based on the totality of circumstances, it is shown that the [election] processes * * * in the State or political subdivision are not equally open to participation by members of a [protected] class [who] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b).

Both Section 2 of the VRA and the Equal Protection Clause of the Fourteenth Amendment prohibit intentional "vote dilution." *Rogers* v. *Lodge*, 458 U.S. 613, 617, 621 (1982) (Fourteenth Amendment); *Garza* v. *County of Los Angeles*, 918 F.2d 763, 766 (9th Cir. 1990) (Section 2), cert. denied, 498 U.S. 1028 (1991); S. Rep. No. 417, 97th Cong., 2d Sess. 27 & n.108 (1982) (Senate Report) (same). Vote dilution is caused "either 'by the dispersal of [minority voters] into districts in which they constitute an ineffective minority of voters or from the concentration of [minority voters] into districts where they constitute an excessive majority.'" *Voinovich* v. *Quilter*, 507 U.S. 146, 154 (1993) (quoting *Thornburgh* v. *Gingles*, 478 U.S. 30, 46 n.11 (1986)).

In addition, vote dilution without a finding of discriminatory intent may violate Section 2 under its "results" test. This Court has identified three "preconditions" for a vote-dilution claim under that test: (1) The minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group must be "politically cohesive," and (3) the majority must "vote[] sufficiently as a bloc" to usually "defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51; see

*Cooper* v. *Harris*, 137 S. Ct. 1455, 1470 (2017). For single-member districting schemes, the first precondition also requires showing a "possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson* v. *De Grandy*, 512 U.S. 997, 1008 (1994). If a party establishes those preconditions, a court then must "consider the 'totality of circumstances' to determine whether members of a racial group have less opportunity than do other members of the electorate." *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 425-426 (2006) (*LULAC*) (quoting *De Grandy*, 512 U.S. at 1011-1012); see Senate Report 27-29 (articulating factors to consider). The Court has reserved the question of how "intentional discrimination affects the *Gingles* analysis" for a Section 2 claim. *Bartlett* v. *Strickland*, 556 U.S. 1, 20 (2009) (plurality opinion).

b. The Equal Protection Clause, in addition to prohibiting intentional vote dilution, forbids the unjustified, predominant use of race in drawing districts, known as "unconstitutional racial gerrymandering." *Shaw* v. *Reno*, 509 U.S. 630, 641 (1993) (*Shaw I*). Such a claim is "'analytically distinct' from a vote dilution claim." *Miller*, 515 U.S. at 911 (citation omitted). In adjudicating a racial-gerrymandering claim, the court must determine whether race was "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district"—*i.e.*, whether race is the "dominant and controlling rationale" for a district's lines. *Id.* at 913, 916. If so, that use of race comports with the Equal Protection Clause only if it is narrowly tailored to serve a compelling state interest. *Id.* at 920; see *Hunt* v. *Cromartie*,

526 U.S. 541, 547 (1999) ("[S]trict scrutiny applies if race was 'the predominant factor' motivating the legislature's districting decision.").

This Court has "long assumed" that States have a compelling interest in complying with Section 2 of the VRA. *Cooper*, 137 S. Ct. at 1469; see, *e.g.*, *Abrams* v. *Johnson*, 521 U.S. 74, 91 (1997); *Shaw* v. *Hunt*, 517 U.S. 899, 915 (1996) (*Shaw II*); *Bush* v. *Vera*, 517 U.S. 952, 978 (1996) (plurality opinion); *Bush*, 517 U.S. at 990 (O'Connor, J., concurring).[3] The predominant use of race in an effort to comply with the VRA will survive strict scrutiny so long as a State has "a 'strong basis in evidence' in support of the (race-based) choice that it has made." *Alabama Legislative Black Caucus* v. *Alabama*, 135 S. Ct. 1257, 1274 (2015) (citation omitted). A "strong basis in evidence" exists so long as legislators "have *good reasons* to believe such use [of race] is required, even if a court does not find that the actions were necessary for statutory compliance." *Ibid.* (citation omitted). That standard affords States "'breathing room' to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Cooper*, 137 S. Ct. at 1464 (quoting *Bethune-Hill* v. *Virginia State Bd. of Elections*, 137 S. Ct. 788, 802 (2017)).

2. This litigation arises from redistricting undertaken by Texas following the 2010 Census. The Census showed that Texas had gained more than four million

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[3] This Court also has repeatedly assumed that States have a compelling interest in complying with Section 5 of the VRA. See, *e.g.*, *Bethune-Hill* v. *Virginia State Bd. of Elections*, 137 S. Ct. 788, 801 (2017) (rejecting racial-gerrymandering claim where the "State had sufficient grounds to determine that the race-based calculus it employed * * * was necessary to avoid violating § 5").

new residents, which entitled it to four additional Representatives in the U.S. House of Representatives. See *Perry* v. *Perez*, 565 U.S. 388, 390 (2012) (per curiam).

a. In June 2011, the Texas Legislature enacted redistricting plans for, as relevant here, the State House (Plan H283) and the U.S. congressional delegation (Plan C185).[4] At that time, Section 5 of the VRA required the State to obtain preclearance before implementing those plans, a process that required it to show that the plans "neither ha[d] the purpose nor w[ould] have the effect" of discriminating on the basis of race. 52 U.S.C. 10304(a). Texas sought preclearance for its 2011 plans by filing a declaratory-judgment action in the District Court for the District of Columbia in July 2011.

Meanwhile, in June and July 2011, various plaintiffs brought Section 2 and constitutional claims against the 2011 congressional and State House plans, which were consolidated before a three-judge district court in the Western District of Texas. That court enjoined use of the 2011 plans and—lacking any final decision on preclearance from the D.C. district court—adopted interim redistricting plans to govern the 2012 elections. In doing so, the district court believed that it "was not required to give any deference to the Legislature's enacted plan[s]." *Perry*, 565 U.S. at 396 (citation and internal quotation marks omitted).

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[4] The Legislature also enacted a redistricting plan for the State Senate, which led to separate litigation before the same three-judge court. See *Davis* v. *Perry*, No. 11-788 (W.D. Tex. Sept. 22, 2011). Following adoption of a revised plan in 2013, the State Senate litigation was dismissed as moot. See *Davis* v. *Abbott*, 781 F.3d 207, 209 (5th Cir.), cert. denied, 136 S. Ct. 534 (2015). The State Senate plan is not at issue in these appeals.

This Court vacated the interim plans and remanded for further proceedings. *Perry*, 565 U.S. at 399. The Court agreed that, absent preclearance of the State's 2011 plans, it was necessary for the district court to devise interim plans for the 2012 elections. *Id.* at 392. The Court concluded, however, that the district court had erred "[t]o the extent [it] * * * substituted its own concept of the 'collective public good'" in formulating interim relief. *Id.* at 396. The Court concluded that "[the] district court should take guidance from the State's recently enacted plan," to the extent the legislative policies reflected in that plan "'do not lead to violations of the Constitution or the Voting Rights Act.'" *Id.* at 393 (citation omitted).

This Court then articulated legal standards for devising interim plans on remand. When portions of a State's enacted plan are alleged to violate the Constitution or Section 2 of the VRA, "a district court should still be guided by that plan, except to the extent those legal challenges are shown to have a likelihood of success on the merits." *Perry*, 565 U.S. at 394. When portions of the State's enacted plan are the subject of a Section 5 preclearance proceeding elsewhere that has not yet been completed, the district court must "tak[e] guidance from a State's policy judgments unless they reflect aspects of the state plan that stand a reasonable probability of failing to gain § 5 preclearance." *Id.* at 395. The Court reiterated that the district court "must, of course, take care not to incorporate into the interim plan any legal defects in the state plan." *Id.* at 394.

b. On remand, in February 2012, the Texas district court ordered the use of revised interim plans for the 2012 elections (Plans C235 and H309). C.J.S. App. 367a-424a; H.J.S. App. 300a-315a. Both were compromise

plans accepted by the State and certain plaintiffs. C.J.S. App. 6a, 368a, 394a-395a.

With respect to congressional districting, Plan C235 made significant changes to nine districts as compared to the Legislature's 2011 plan. But it made no changes to the two congressional districts now at issue: CD27, a majority-Anglo district covering Nueces County (which includes Corpus Christi) and points northward; and CD35, a majority-Latino district extending from Travis County (Austin) to Bexar County (San Antonio). C.J.S. App. 408a, 419a.

Before 2011, CD27 had been a majority-Latino district that included Nueces County. The 2011 version of CD27 still included the concentration of Latino voters in Nueces County, but placed them in a majority-Anglo district. C.J.S. App. 417a. Various plaintiffs raised Section 2 claims and Section 5 arguments against the new CD27 (*id.* at 388a, 417a-423a), but the district court concluded that those challenges were unlikely to succeed under the standards articulated in *Perry*. The court found that, regardless of how CD27 was configured, "only 7 reasonably compact Latino opportunity districts c[ould] be drawn in compliance with § 2" in the "South and West Texas area." *Id.* at 418a, 421a. And the court explained that Plan C235 would restore a different district—CD23—as a Latino opportunity district, thereby ensuring that the plan had seven such districts. The court thus concluded that Plan C235 "substantially addresses the § 2 violation," and retention of the 2011 version of CD27 was appropriate in order to "respect[] the Legislature's policy decisions concerning the placement of Nueces County." *Id.* at 421a. The court also did not identify any retrogression concerns with CD27 under Section 5. Cf. *id.* at 399a, 422a-423a.

As to CD35, one group of private plaintiffs urged the district court to find it a proper Section 2 Latino opportunity district, while others urged the court to reject it as an unconstitutional racial gerrymander or as intentionally vote dilutive. The court concluded that the racial-gerrymandering claim was a "close call," C.J.S. App. 409a, but found that the challenge was likely without merit, both because of inadequate evidence that race had predominated in the creation of CD35 and because there was no substantial likelihood that CD35 would fail strict scrutiny in any event. *Id.* at 415a. The court also found that plaintiffs had not shown that CD35 was created for the discriminatory purpose of "dismantling" a prior "crossover" district (CD25) rather than because of "partisan politics." *Ibid.*[5]

With respect to the State House, in ordering the use of Plan H309, the district court made "substantial[]" changes to 21 districts. H.J.S. App. 314a. But Plan H309 retained 122 State House districts without change, including most of those now before this Court: HD54 and HD55 in Bell County; HD32 and HD34 in Nueces County; and HD103, HD104, and HD105 in Dallas County. *Id.* at 303a n.4. The court explained that by keeping those districts unchanged, it was "[f]ollowing [this] Court's direction to leave undisturbed any district that is free from legal defect." *Id.* at 303a.

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[5] A "crossover" district is "one in which minority voters make up less than a majority of the voting-age population," but in which the "minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Bartlett*, 556 U.S. at 13 (plurality opinion). A "coalition" district is one in which "two minority groups form a coalition to elect the candidate of the coalition's choice." *Ibid.*

Although the district court found that Plans C235 and H309 satisfied this Court's standards in *Perry*, it noted that its decisions were preliminary and not final rulings on the merits of any claim concerning the 2011 plans. C.J.S. App. 367a; H.J.S. App. 315a. The 2012 elections were conducted under Plans C235 and H309.

c. In August 2012, the D.C. district court denied preclearance to Texas's 2011 congressional and State House redistricting plans. See *Texas* v. *United States*, 887 F. Supp. 2d 133 (three-judge court), vacated and remanded, 133 S. Ct. 2885 (2013). As to the congressional plan, the court concluded that Texas had failed to meet its burden under Section 5 of the VRA to prove an absence of discriminatory intent. *Id.* at 159-166. As to the State House plan, the court concluded that Texas had failed to meet its burden under Section 5 to establish the absence of retrogressive effect, and also stated that the record suggested that that effect "may not have been accidental." *Id.* at 178; see *id.* at 166-178. The State appealed the denial of preclearance to this Court.

d. In March 2013—while Texas's preclearance appeal was pending, and while the litigation below was held in abeyance—the Texas Attorney General proposed to the Legislature that it enact the district court's 2012 interim maps as the State's permanent redistricting plans. C.J.S. App. 429a-435a. He observed that the 2011 plans had been found by the D.C. district court to be "tainted by evidence of discriminatory purpose," and explained that "the best way to remedy the violations * * * is to adopt the court-drawn interim plans as the State's permanent redistricting maps." *Id.* at 432a. In May 2013, the Texas Governor called the Legislature into special session to consider that proposal. C.J.S. Supp. App. 231a.

On June 23, 2013, the Texas Legislature passed bills adopting new redistricting plans. The Texas Legislature adopted without alteration the court-ordered congressional interim map (Plan C235) as its permanent congressional plan. C.J.S. App. 9a. The Legislature made minor changes to the court-ordered State House interim map and then enacted that map as its permanent State House plan (Plan H358). *Ibid.* The 2013 plans were signed into law on June 26, 2013, and became effective in September 2013. C.J.S. Supp. App. 232a.

e. On June 25, 2013, this Court issued its decision in *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), holding that the coverage formula in Section 4(b) of the VRA was unconstitutional and could "no longer be used as a basis for subjecting jurisdictions to preclearance" under Section 5. *Id.* at 2631. This Court then vacated the D.C. district court's judgment denying preclearance, 133 S. Ct. 2885, and on remand, that court granted Texas's motion for voluntary dismissal.

3. a. Litigation in the Texas district court resumed. The court allowed plaintiffs to amend their complaints to challenge the newly enacted 2013 plans and, with respect to existing claims against the 2011 plans, to seek relief under Section 3(c) of the VRA, 52 U.S.C. 10302(c). D. Ct. Doc. 886, at 8-19 (Sept. 6, 2013).[6] The court ordered, however, that the Legislature's newly enacted 2013 plans (Plans C235 and H358) would be used for the 2014 elections. *Id.* at 21-26. The court noted that it had

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[6] Section 3(c), known as the VRA's "bail-in" provision, permits a district court, upon a finding that "violations of the [F]ourteenth or [F]ifteenth [A]mendment justifying equitable relief have occurred within the territory of [a] State or political subdivision," to require the defendant to seek approval of future voting changes through a regime similar to Section 5 preclearance. 52 U.S.C. 10302(c).

"already" conducted "a preliminary injunction analysis" on plaintiffs' challenges in its decisions adopting the 2012 interim plans, *id.* at 22, and it found that the sole "new legal challenge" brought by plaintiffs (concerning HD90, which had been modified by the 2013 Legislature) was not likely to succeed, *id.* at 23-24. The court acknowledged it still needed to "reach a final decision on the merits of all claims," but concluded that it was "impossible to reach that decision prior to the various deadlines for the 2014 elections." *Id.* at 22.

The United States intervened in the litigation. D. Ct. Doc. 904 (Sept. 24, 2013). In its complaint, the United States did not challenge the 2013 plans, but instead argued that the 2011 plans (Plans C185 and H283) had been adopted with racially discriminatory intent in violation of Section 2 and that Section 3(c) relief was warranted. D. Ct. Doc. 907, at 14 (Sept. 25, 2013). The United States' complaint asserted only intentional vote-dilution claims, and did not raise any Section 2 results claims.

b. In July and August 2014, the Texas district court conducted bench trials on the claims against the 2011 congressional and State House plans. C.J.S. App. 13a.

In October 2015, while a decision on the 2011 plans was still pending, plaintiffs sought a preliminary injunction barring the use of the 2013 plans for the 2016 elections. The court denied that request, explaining that the 2013 plans were "the product of the [c]ourt's preliminary injunction analysis" in 2012, and concluding that "scrutinizing the same plan[s] under the same preliminary injunction analysis would [not] produce a different outcome today." D. Ct. Doc. 1324, at 5-6 (Nov. 6, 2015). The 2013 plans were therefore used for the 2016 elections.

c. Two-and-a-half years after trial, in various orders issued in March through May 2017, the district court held by a 2-1 vote that Texas had violated the VRA, the Constitution, or both in drawing various districts in the 2011 plans. C.J.S. App. 120a-366a; H.J.S. App. 88a-299a; see C.J.S. Supp. App. 1a-490a (separate findings of fact); H.J.S. Supp. App. 1a-309a (same).

As relevant here, with respect to the 2011 congressional plan, the district-court majority found that CD27 and CD35 were unlawful (notwithstanding the district court's prior provisional determinations to the contrary). C.J.S. App. 161a-195a, 330a. As to CD27, the court concluded that the placement of Hispanic voters in Nueces County into a majority-Anglo district "had the effect and was intended to dilute their opportunity to elect their candidate of choice." *Id.* at 330a. The court stated that, although only "seven compact Latino opportunity districts could be drawn in South/West Texas," "Nueces County Hispanics could be included in one of those districts for § 2 purposes." *Id.* at 181a. As to CD35, the court concluded that the district was an unconstitutional racial gerrymander, finding that race had predominated in its construction and that the district could not survive strict scrutiny. *Id.* at 175a. Judge Smith dissented, both on the ground that the challenges to the 2011 plans were moot and on the merits. *Id.* at 331a-366a.

With regard to the 2011 State House plan, the district-court majority found that plaintiffs had proven intentional vote dilution on a statewide basis and also in certain regions. H.J.S. App. 192a, 275a. The specific districts invalidated because of discriminatory intent included those in Nueces County (HD32 and HD34), Bell County (HD54 and HD55), and Dallas County (HD103, HD104, and HD105). *Id.* at 126a-137a, 164a-173a, 178a-

183a, 275a. Judge Smith again dissented on both mootness and the merits. *Id.* at 277a-299a.

After issuing those decisions on the 2011 plans, the district court held a trial on the 2013 plans in July 2017. Because the United States asserted no claims against the 2013 plans, it did not participate in the trial.

d. In decisions issued in August 2017, the district court invalidated several districts in the State's 2013 congressional and State House plans. See C.J.S. App. 3a-119a; H.J.S. App. 3a-87a.

As relevant here, the district court held that every district it had found to be intentionally discriminatory or racially gerrymandered in the 2011 plans was also necessarily unlawful in the 2013 plans "where th[e] district lines remain[ed] unchanged." C.J.S. App. 46a; see *id.* at 35a; H.J.S. App. 6a. The court acknowledged that the 2013 Legislature had effectively "adopted the [c]ourt's [interim] plans" from 2012, but reasoned that that action "d[id] not change" the analysis because the Legislature "did not engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." C.J.S. App. 40a. Based on that conclusion, the court suggested that the Legislature had enacted the 2013 plans "as part of a litigation strategy" designed to "insulate" the State's actions from further challenge, rather than as an attempt to "adopt legally compliant plans free from discriminatory taint." *Id.* at 40a-41a. Thus, as to the 2013 congressional plan, the district court invalidated CD27 and CD35, see *id.* at 117a-118a, and as to the 2013 State House plan, the court invalidated HD32 and HD34 (Nueces County), HD54 and

HD55 (Bell County), and HD103, HD104, and HD105 (Dallas County), see H.J.S. App. 84a-85a.[7]

Concluding that these violations "must be remedied," C.J.S. App. 117a; see H.J.S. App. 84a-85a, the district court directed the Texas Attorney General to advise the court "within three business days" whether the Texas Legislature would "take up redistricting in an effort to cure these violations." C.J.S. App. 118a; H.J.S. App. 86a. The court further ordered that, absent such legislative redistricting, it would hold "hearing[s] to consider remedial plans" in early September 2017. *Ibid.*

Texas sought emergency relief from this Court, which stayed the district court's orders invalidating the 2013 redistricting plans. Order, No. 17A225 (Sept. 12, 2017); Order, No. 17A245 (Sept. 12, 2017). Upon consideration of Texas's jurisdictional statements, this Court ordered briefing and postponed further consideration of the question of jurisdiction pending hearing of the case on the merits. Order, No. 17-586 (Jan. 12, 2018); Order, No. 17-626 (Jan. 12, 2018).

## SUMMARY OF ARGUMENT

I. This Court possesses jurisdiction under 28 U.S.C. 1253, which allows direct appeals to this Court from an

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[7] The district court also invalidated HD90—a district newly drawn in the 2013 State House plan—as a racial gerrymander, and held that HD32 and HD34 were unlawful for the additional reason that they violated the Section 2 results test. See H.J.S. App. 85a. In addition, the court held that CD27 violated the Section 2 results test. C.J.S. App. 112a; see also *id.* at 180a-195a. The United States takes no position on those rulings. The United States did not assert any results claims in this litigation, and HD90 was revised in 2013 and thus does not involve the legislative adoption of a district provisionally approved by the district court—the principal issue addressed by the United States in this brief.

order granting or denying an interlocutory or permanent injunction in three-judge district-court actions under 28 U.S.C. 2284(a) challenging the constitutionality of congressional districts or statewide legislative apportionments. This Court has made clear in the analogous context of 28 U.S.C. 1292(a)(1) that even an order not styled as the grant or denial of an injunction is appealable if it has the "practical effect" of granting or denying an injunction, "might have a 'serious, perhaps irreparable, consequence,'" and "can be 'effectually challenged' only by immediate appeal." *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 (1981). Under the unusual facts of this case, the district court's orders meet those standards. The orders had the effect of prohibiting further use of the State's 2013 congressional and State House plans; they had the serious consequence of requiring statewide redistricting on the eve of preparations for the 2018 election cycle; and, under the timing exigencies present here, the orders could only be effectually challenged by immediate appeal.

II. The district court committed errors of law in finding that the Texas Legislature engaged in intentional vote dilution in adopting Congressional District 27 and State House Districts 32, 34, 54, 55, 103, 104, and 105 in the 2013 plans, all of which were identical to districts contained in the court's own 2012 interim plans.

A. The principles for adjudicating claims of intentional vote dilution are well established. A legislative enactment may be invalidated on that basis only if the plaintiffs show that the legislature acted with a discriminatory purpose. In the redistricting context, as elsewhere, courts must accord a "presumption of good faith [to] legislative enactments." *Hunt* v. *Cromartie*, 526 U.S. 541, 553 (1999) (citation omitted). Courts must not

infer discriminatory racial intent solely from disparate racial effects, and a finding of past intentional discrimination standing alone generally cannot support an inference of intentional discrimination in a new enactment. And when, as here, a State adopts legislatively a new redistricting plan after a prior plan is held unlawful, the burden of proof rests on the plaintiff in any challenge to the new plan.

These principles also suggest a further principle: A court should afford particular weight to a state legislature's reliance on a court-ordered remedy. When a court has found in a reasoned decision that an interim plan redresses all likely violations of law, and when the state legislature permanently adopts that plan to replace its original enactment, the normal presumption of good faith accorded to legislative enactments is heightened by the State's acceptance of the judicial plan. Applying a strong presumption of good faith in this context would not direct an answer to the intent inquiry as a matter of law, but plaintiffs should bear a heavy burden in establishing that a state legislature's adoption of a court-ordered plan was intentionally discriminatory.

B. The district court erred in its analysis of intentional vote dilution. Instead of asking whether plaintiffs had proven that the 2013 Legislature adopted the 2013 plans with the purpose of harming minority voters, the court asked whether the State had shown that it removed the "taint of discriminatory intent" that in the court's view had "carr[ied] over" from the 2011 plans. C.J.S. App. 38a, 46a. But the lawfulness of the 2013 plans turns on the motivations of the 2013 Legislature, and plaintiffs—not the State—bore the burden of proof in that analysis.

C. The circumstances here confirm the soundness of applying a strong presumption of good faith. The 2013 Legislature's plans were identical, or nearly so, to the court-ordered interim plans. In adopting those interim plans after extensive evidentiary proceedings, the district court expressly considered under *Perry* v. *Perez*, 565 U.S. 388 (2012) (per curiam), and provisionally rejected, claims of intentional discrimination involving the same districts now at issue. And the court made numerous other ameliorative changes, which gave the Legislature good reason to believe that the interim plans would suffice to remedy any prior deficiencies.

The district court's orders and plaintiffs' jurisdictional-stage filings in this Court do not point to evidence that would rebut the strong presumption of good faith. The court perceived that Texas was motivated to pursue a legislative solution as a "strategy" to end the pending litigation. But such efforts at voluntary compliance presumptively further—not frustrate—Congress's goal of ameliorating unlawful discrimination. And the court identified no evidence showing that Texas acted with an intent to discriminate rather than an intent to adopt legally compliant plans.

III. The district court also erred in finding Congressional District 35 to be an unconstitutional racial gerrymander. The "predominant" consideration in setting the boundaries of CD35 in 2013 was not race, but rather whether they matched the boundaries provisionally deemed lawful in 2012. And the State had "good reasons" to believe that the Voting Rights Act required it to draw CD35 in 2011 and maintain it in 2013, including that the district court had found in 2012 that CD35 aided in complying with the State's obligations under

the VRA to draw seven Latino opportunity districts in South and West Texas.

## ARGUMENT

### I. THIS COURT MAY EXERCISE JURISDICTION OVER THESE APPEALS

A party may appeal directly to this Court "from an order granting or denying * * * an interlocutory or permanent injunction" in a civil action required to be adjudicated by a three-judge district court. 28 U.S.C. 1253. Under 28 U.S.C. 2284(a), a three-judge district court is required for actions "challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." Ordinarily, when a district court has not entered an order granting or denying an injunction, this Court lacks jurisdiction to enter a direct appeal. The Court has made clear in the analogous context of 28 U.S.C. 1292(a)(1), however, that even an order not styled as the grant or denial of an injunction is appealable if it (1) has the "practical effect" of granting or denying an injunction; (2) "might have a 'serious, perhaps irreparable, consequence'"; and (3) "can be 'effectually challenged' only by immediate appeal." *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 (1981); see *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 287-288 (1988). In the circumstances presented here, the district court's August 15 and 24 orders meet those standards.

A. This case presents an unusual combination of extraordinary delays in the judicial proceedings followed by the equally extraordinary expedition of those proceedings on the eve of preparations for the upcoming election cycle. After Texas enacted the 2013 congressional and State House plans, plaintiffs promptly

amended their complaints to challenge them. But the trial on the 2013 plans was not held until July 2017, and the district court did not issue its decisions on those plans until mid-August 2017, even though Texas had previously informed the district court that its deadlines to begin preparations for the 2018 election cycle required that its plans be in place no later than October 1, 2017. See D. Ct. Doc. 1388, at 1-2 (May 1, 2017).[8] By the time the district court finally ruled, the 2013 plans (or the 2012 court-ordered plans on which they were based) had been used for three straight election cycles (2012, 2014, and 2016).

The district court's August 15 and August 24 orders held that the 2013 plans were unlawful and made clear that those plans would not be used for the upcoming 2018 elections. The court's orders found that the 2013 congressional and State House plans contained various "statutory and constitutional violations" and stated that those violations "must be remedied by either the Texas Legislature or this Court." C.J.S. App. 118a; H.J.S. App. 84a-85a (similar). The court then directed the Texas Attorney General to advise, within only "three business days," whether "the Legislature intends to

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[8] Texas advised the district court that pursuant to Texas Election Code § 14.001 (West 2017), election officials were required to mail voter election certificates on or after November 15, 2017, but before December 6, 2017. See D. Ct. Doc. 1388, at 2. The State indicated that October 1, 2017 was "the last possible date when individual voter-registration-templates must be provided by the Secretary of State to each of the 254 county election officials in the State of Texas." *Id.* at 1-2. The State's primary elections are scheduled for March 6, 2018.

take up redistricting in an effort to cure these violations." C.J.S. App. 118a; H.J.S. App. 86a.[9] The court further directed that "[i]f the Legislature does not intend to take up redistricting," the court would hold "hearing[s] to consider remedial plans" on September 5 and 6, 2017. *Ibid.* The court ordered that, in that event, "the parties must take immediate steps to consult with their experts and mapdrawers and prepare statewide * * * plans that remedy the violations." *Ibid.*

In these circumstances, the district court's orders were tantamount to injunctive relief. The court's significant delay, coupled with the impending deadlines and the remarkably compressed time frame to consider a possible legislative enactment, placed Texas in a difficult position: because the district court found the existing plans "unlawful" and ordered that they "must be remedied," Texas could be quite confident that the district court would not permit it to use those plans for the 2018 elections, even though the court had approved their use in prior years. Yet that consequence was not expressly stated in the form of an injunction. Had Texas been required to wait until the district court entered an express injunction, it would likely have come too late to afford Texas a reasonable opportunity under

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[9] That three-day response period was far shorter than is typically afforded to a state legislature, which this Court has stated should be given a "reasonable opportunity" to contemplate a possible legislative remedy before being compelled to proceed to remedial litigation. *Lawyer* v. *Department of Justice*, 521 U.S. 567, 576 (1997) (quoting *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978) (principal opinion)).

the circumstances for appellate review before deadlines associated with the 2018 election cycle.[10]

B. None of this Court's decisions compels a different result. In *Gunn* v. *University Committee to End the War in Viet Nam*, 399 U.S. 383 (1970), this Court held that it lacked jurisdiction under Section 1253 over a three-judge district-court order that declared a state law unconstitutional, but declined to enter an immediate injunction. That case, however, did not involve a redistricting suit under 28 U.S.C. 2284(a) or the timing considerations present here, and it cannot be said that the district court's liability determination in that case could only be effectually challenged by immediate appeal. Similarly, in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), this Court held in a footnote that it lacked jurisdiction under Section 1253 to entertain an appeal from an interlocutory liability determination in a redistricting case. *Id.* at 138 n.19; see *Whitcomb* v. *Davis*, 403 U.S. 914 (1971) (order dismissing appeal). But that case, too, did not involve the timing pressures present here, and the Court did not expressly consider whether the district court's liability ruling may have had the practical effect of an injunction.

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[10] We do not suggest that such preliminary deadlines in the election cycle should stand as an obstacle to relief on the merits if the Court were to find a violation of the VRA or the Constitution and if the considerations identified in *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006) (per curiam), for withholding relief close to an election are not yet present. As explained in the text, however, the delays and resulting compressed time frame are relevant for purposes of construing 28 U.S.C. 1253 and 2284(a), which provide for direct review of injunctions against statewide reapportionment plans to ensure prompt resolution of challenges to such plans and to accord respect for acts of a state legislature.

## II. THE DISTRICT COURT ERRED IN ITS ANALYSIS OF INTENTIONAL VOTE DILUTION IN THE 2013 CONGRESSIONAL AND STATE HOUSE PLANS

On the merits, the Court should correct the legal errors underlying the district court's rulings that the Texas Legislature engaged in intentional vote dilution in 2013 when it adopted Congressional District 27, and State House Districts 32, 34, 54, 55, 103, 104, and 105, without change from the court's own 2012 interim plans. The court rested its rulings on determinations that the State's original 2011 plans were tainted with "discriminatory intent" and that the Legislature failed to "cleanse" that intent in enacting its new 2013 plans. C.J.S. App. 44a. But in deciding whether the 2013 plans were intentionally discriminatory, the court should have evaluated the intent of the 2013 Legislature, and should have applied the familiar principles for discerning the intent of a legislative body, which include a presumption of good faith. That presumption should be particularly strong here, because the Legislature enacted the interim plans adopted by the district court. Viewed under the correct legal framework, the evidence invoked by the district court, and discussed by plaintiffs in their motions to dismiss or affirm in this Court, would not be sufficient to overcome that strong presumption of good faith and to establish discriminatory intent.

### A. Plaintiffs' Claims Of Intentional Vote Dilution Require Them To Show That The 2013 Legislature Acted With A Discriminatory Racial Purpose

Plaintiffs claim that the 2013 plans (Plans C235 and H358) intentionally diluted the voting strength of minority voters in several districts in violation of Section 2 of the VRA and the Fourteenth Amendment. The

principles for adjudicating those claims are well established.

1. A legislative enactment may be invalidated on grounds of intentional discrimination only if the legislature "acted with a discriminatory purpose." *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997). "'Discriminatory purpose' * * * implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 279 (1979) (citation omitted). Thus, "even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." *Id.* at 272.

The inquiry into a legislature's motivation is an "inherently complex endeavor." *Hunt* v. *Cromartie*, 526 U.S. 541, 546 (1999). "Outright admissions of impermissible racial motivation are infrequent." *Id.* at 553. More commonly, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); see *Rogers* v. *Lodge*, 458 U.S. 613, 618 (1982) (recognizing that "an invidious discriminatory purpose" may often be "inferred from the totality of the relevant facts") (quoting *Washington* v. *Davis*, 426 U.S. 229, 242 (1976)). The determination of a legislature's motivation, though guided by legal principles, is ultimately an issue of fact. See *Hunt*, 526 U.S. at 549 ("The legislature's motivation is itself a factual question.").

In *Arlington Heights*, this Court set forth several considerations in analyzing "whether invidious discriminatory purpose was a motivating factor" in a government body's decisionmaking. 429 U.S. at 266; see *Bossier Parish*, 520 U.S. at 481 (noting that *Arlington Heights* "serve[s] as the framework for examining discriminatory purpose in cases brought under the Equal Protection Clause"). Under this framework, courts consider (1) whether the "impact of the official action * * * bears more heavily on one race than another"; (2) "the historical background of the decision"; (3) "[t]he specific sequence of events leading up to the challenged decision"; (4) any "[d]epartures from the normal procedural sequence"; and (5) "[t]he legislative or administrative history, especially . . . [any] contemporary statements by members of the decisionmaking body." *Bossier Parish*, 520 U.S. at 489 (quoting *Arlington Heights*, 429 U.S. at 266-268) (brackets in original). This Court has repeatedly applied this framework to assess legislative intent in the context of challenges to state redistricting plans. See *Hunt*, 526 U.S. at 546-549; *Shaw* v. *Reno*, 509 U.S. 630, 644 (1993) (*Shaw I*); *Rogers*, 458 U.S. at 618.

In performing this inquiry, the burden rests on the "plaintiff" to "establish that the State * * * acted with a discriminatory purpose." *Bossier Parish*, 520 U.S. at 481; cf. *Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005) (recognizing that the burden of proof generally rests on the party alleging a violation of federal law); *Voinovich* v. *Quilter*, 507 U.S. 146, 155-156 (1993) ("Section 2, however, places at least the initial burden of proving an apportionment's invalidity squarely on the plaintiff's shoulders."). If, and only if, a plaintiff proves intentional discrimination does the burden shift to the defendant to establish any available defense, such as by

showing that it would have taken the same action for valid reasons even absent impermissible discrimination. See *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 285-286 (1977).

2. The Court has recognized several additional principles relevant to adjudicating claims of unlawful racial intent in the context of state legislative redistricting.

First, this Court has emphasized in the redistricting context that courts must accord a "presumption of good faith [to] legislative enactments." *Hunt*, 526 U.S. at 553 (quoting *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995)). The Court has explained that "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *Miller*, 515 U.S. at 915, because legislative apportionment is "primarily the duty and responsibility of the State," *Shelby County* v. *Holder*, 133 S. Ct. 2612, 2623 (2013) (quoting *Perry* v. *Perez*, 565 U.S. 388, 392 (2012)) (per curiam); see *Cooper* v. *Harris*, 137 S. Ct. 1455, 1463 (2017) ("The Constitution entrusts States with the job of designing congressional districts."). For that reason, "courts must 'exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.'" *Bethune-Hill* v. *Virginia State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (quoting *Miller*, 515 U.S. at 916).

Second, this Court has explained that, although inquiry into the effects of a challenged action "may provide an important starting point" for analysis, "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Arlington Heights*, 429 U.S. at 264-266 (citing *Davis*, 426 U.S. at 242); see also, *e.g.*, *Coleman* v. *Court of Appeals*, 566 U.S. 30, 42 (2012) (plurality opinion). Thus, a State's

decision to "choose a redistricting plan that has a dilutive impact does not, without more, suffice to establish that the jurisdiction acted with a discriminatory purpose." *Bossier Parish*, 520 U.S. at 487-488; cf. *Miller*, 515 U.S. at 914 (stating in racial-gerrymandering context that "impact alone" is usually "not determinative, and the Court must look to other evidence of race-based decisionmaking").

Third, this Court has recognized that a finding of intentional discrimination in a prior legislative enactment is ordinarily insufficient, standing alone, to support an inference of intentional discrimination in a later enactment. "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion). Of course, "[t]he historical background" to a challenged enactment is a relevant consideration, *Arlington Heights*, 429 U.S. at 267, including evidence pertaining to events that are "reasonably contemporaneous with the challenged decision," *McCleskey* v. *Kemp*, 481 U.S. 279, 298 n.20 (1987). But even when a prior finding of intentional discrimination was recent, "[t]he ultimate question" under *Arlington Heights* must be "whether a discriminatory intent has been proved in [the] given case"—that is, for the particular challenged enactment. *City of Mobile*, 446 U.S. at 74 (plurality opinion).

Fourth, this Court's decisions indicate that, when a State enacts a new redistricting plan in response to a judicial order holding a prior plan unconstitutional, the plaintiff retains the burden of proof in any challenge to the State's new plan. This Court has long recognized that when a federal court has determined that a new apportionment is required, a State "should be given the

opportunity to make its own redistricting decisions so long as that is practically possible." *Lawyer* v. *Department of Justice*, 521 U.S. 567, 576 (1997); see *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978) (principal opinion). And even when practical necessities dictate the implementation of a court-drawn map in the first instance, States nonetheless remain "free to replace court-mandated remedial plans by enacting redistricting plans of their own." *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 416 (2006) (*LULAC*) (opinion of Kennedy, J.); see *Wise*, 437 U.S. at 540 (principal opinion); *Burns* v. *Richardson*, 384 U.S. 73, 85 (1966). When a State avails itself of that opportunity, "[t]he new legislative plan * * * will then be the governing law unless it, too, is challenged and found to violate the Constitution." *Wise*, 437 U.S. at 540 (principal opinion); accord *id.* at 548 (opinion of Powell, J., joined by three other Justices concurring in part and concurring in the judgment); *id.* at 550 (Marshall, J., dissenting, joined by two other Justices) (agreeing with the relevant portion of the principal opinion); see also *Mississippi State Chapter, Operation PUSH, Inc.* v. *Mabus*, 932 F.2d 400, 408-409 (5th Cir. 1991) (holding that plaintiff had failed to "establish[] that the Mississippi Legislature" had "a racially discriminatory purpose" in enacting its legislative remedy for a Section 2 violation).

3. The foregoing principles, taken together, suggest a further principle. In considering the "historical background" and "specific sequence of events" leading to a revised legislative action, *Arlington Heights*, 429 U.S. at 267, a court should afford particular weight to a state legislature's reliance on a court's determination that a particular remedy is both necessary and likely sufficient to cure a legal violation. When, as here, a court has found

that an interim plan is sufficient to redress all likely violations of law, and when the state legislature permanently adopts that plan to replace its original enactment, the normal presumption of good faith accorded to legislative enactments is heightened by the State's acceptance of the judicial plan. Courts should operate from a strong presumption that the state legislature's adoption of the judicially approved remedy was due to good-faith compliance efforts rather than sinister motives.

Applying a strong presumption of good faith in this context would not direct an answer to the intent inquiry as a matter of law. Even when a state legislature permanently adopts a remedy that a court has provisionally declared to be lawful, a plaintiff may attempt to prove that the legislature adopted that remedy not in good faith, but rather for the purpose of harming racial minorities and perpetuating unlawful discrimination. Cf. *Hayden* v. *Paterson*, 594 F.3d 150, 167 (2d Cir. 2010) (contemplating the "possibility that a legislative body might seek to insulate from challenge a law known to have been originally enacted with a discriminatory purpose"). The legislature's adoption of a court-ordered plan cannot immunize a State from all possible liability, including for intentional wrongdoing when it exists. Cf., *e.g.*, *LULAC*, 548 U.S. at 416 (opinion of Kennedy, J.) ("Judicial respect for legislative plans * * * cannot justify legislative reliance on improper criteria for districting determinations."); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) (recognizing that courts "need not * * * accept at face value assertions of legislative purposes" if "examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation"). Plaintiffs should bear a heavy burden, however, in establishing

that a state legislature's adoption of a court-ordered plan was intentionally discriminatory.

### B. The District Court Incorrectly Presumed Discriminatory Intent And Shifted The Burden Of Proof To The State

Rather than applying the settled framework for intentional vote-dilution claims, the district court undertook a fundamentally different analysis. The court did not ask whether plaintiffs had proven that the Legislature, in enacting the 2013 plans, acted with the purpose of harming minority voters. Instead, the court asked whether the State had shown that it had removed the "taint of discriminatory intent" associated with certain districts in its 2011 plans. C.J.S. App. 38a.[11] The court's analysis reflects several legal errors.

1. First, the district court incorrectly assumed that discriminatory intent associated with old legislation persists into new litigation unless that prior intent is confronted and somehow affirmatively extirpated. The court faulted the Legislature for not undertaking a "deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." C.J.S. App. 40a. The court concluded that, in light of that failure, "the racially discriminatory intent * * * that it previously found in the 2011 plans carr[ied] over into the 2013 plans where those district lines remain unchanged." *Id.*

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[11] The district court briefly recited the *Arlington Heights* framework in the background of its opinion, see C.J.S. App. 27a, but its analysis did not follow that framework. The sole arguable application of *Arlington Heights* appeared in a footnote, in which the district court observed that the "history of discrimination" in Texas "support[ed]" the court's findings under its taint analysis. *Id.* at 38a-39a n.27.

at 46a; see *id.* at 117a (same); H.J.S. App. 6a (incorporating same analysis).

That presumption of persistent discriminatory intent is inconsistent with the analysis required by this Court's decisions. See pp. 26-30, *supra*. It also makes little sense. Whether intentional discrimination existed in enacting the 2013 redistricting plans is a question about the motives of the 2013 Legislature. Although under *Arlington Heights* as applied in the redistricting context, a history of prior discrimination by a state or local legislative body can be relevant, the central inquiry is whether the legislature that enacted the particular law at issue did so for an impermissible purpose.[12] Legislative intent is not an artifact that "carr[ies] over" from one law to the next; it must be decided anew with each successive enactment. See, *e.g.*, *City of Mobile*, 446 U.S. at 74 (plurality opinion) (inquiring "whether a

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[12] In its jurisdictional statement, Texas appears to contend (C.J.S. 25-28) that the district court impermissibly relied on factual findings about the 2011 Legislature's intent because claims concerning the 2011 plans were moot. Regardless of whether the claims concerning the 2011 plans were moot, the district court was not foreclosed, under the *Arlington Heights* analysis in this redistricting context, from considering the "historical background of" and "sequence of events leading up to" enactment of the 2013 redistricting plans, including whether the 2011 Legislature acted with discriminatory intent. But the pertinent question is whether the *2013 plans* were unlawful, and those plans are entitled to a strong presumption of validity because the Texas Legislature enacted the court's own interim plans with little or no change. As explained below, evidence concerning the 2011 plans alone is not sufficient to overcome that presumption and establish impermissible intent on the part of the 2013 Legislature, and neither the district court nor plaintiffs in their motions to dismiss or affirm have identified other evidence that does so. See pp. 40-44, *infra*.

discriminatory intent has been proved" as to the particular enactment at issue, because "past discrimination cannot * * * condemn governmental action that is not itself unlawful"); cf. *Palmer* v. *Thompson*, 403 U.S. 217, 225 (1971) (contemplating that a law invalidated because of improper motive might "be valid" if the legislature "repassed it for different reasons").

In support of its belief that the discriminatory intent from 2011 "carr[ied] over" into 2013, the district court invoked this Court's decision in *Hunter* v. *Underwood*, 471 U.S. 222 (1985). See C.J.S. App. 35a ("With regard to those areas in Plan C185 and Plan H283 where the Court found that [the] district lines were drawn with impermissible motive * * * , *Hunter* indicates that those portions of the plans remain unlawful."). But *Hunter* did not involve a subsequent legislative enactment at all. Rather, the question was whether a 1901 provision of the Alabama Constitution, which provided for the disenfranchisement of persons "convicted of, among other offenses, 'any crime . . . involving moral turpitude,'" was invalid because it had been adopted with the purpose of disenfranchising black voters. 471 U.S. at 223. In defending the constitutionality of that provision, Alabama urged that the passage of time, coupled with intervening judicial rulings narrowing the predicate crimes giving rise to disenfranchisement, had vitiated any intentional discrimination.

This Court rejected that proposition, explaining that the prior judicial invalidation of "[s]ome of the more blatantly discriminatory selections" of crimes (including "miscegenation") did not cure the intentional discrimination motivating other then-surviving provisions. *Hunter*, 471 U.S. at 233. But *Hunter* specifically contemplated that a different analysis would apply if the

challenged provisions had been reenacted at a later time, and reserved the question whether the challenged provision "would be valid if enacted today without any impermissible motivation." *Ibid.*; see *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 465 n.17 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (describing *Hunter* as "h[olding] that extant laws originally motivated by a discriminatory purpose continue to violate the Equal Protection Clause, even if they would be permissible were they reenacted without a discriminatory motive"); *Cotton* v. *Fordice*, 157 F.3d 388, 391 (5th Cir. 1998) (noting that *Hunter* "left open the possibility that by amendment, a facially neutral provision * * * might overcome its odious origin").

Consistent with that understanding of *Hunter*, several courts of appeals have recognized that, when a State reenacts a particular voting provision that was intentionally discriminatory when first enacted, the ultimate focus in any subsequent litigation must be the intent of the reenacting legislature, not the original one. See *Hayden*, 594 F.3d at 166-167 (addressing felon-disenfranchisement law); *Johnson* v. *Governor*, 405 F.3d 1214, 1223-1224 (11th Cir.) (en banc) (same), cert. denied, 546 U.S. 1015 (2005); *Cotton*, 157 F.3d at 391-392 & n.7 (same); *Chen* v. *City of Houston*, 206 F.3d 502, 520-521 (5th Cir. 2000) (addressing racial-gerrymandering claim), cert. denied, 532 U.S. 1046 (2001). Those courts also have rejected the proposition that prior intent "remains legally operative" unless and until some affirmative contrary showing is made. *Johnson*, 405 F.3d at 1223; see *Hayden*, 594 F.3d at 166-167 (quoting and citing *Johnson* with approval); accord *Cotton*, 157 F.3d at 392 (reaffirming that plaintiff was required to

show that the "*current* version" of the law was "adopted out of a desire to discriminate") (emphasis added).[13]

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[13] The district court declared that the "most relevant case" supporting its analysis was *Chen* v. *City of Houston*, *supra*, but that decision is fully consistent with the above-stated principles. C.J.S. App. 35a; cf. *id.* at 35a-39a. In *Chen*, the plaintiffs alleged that the City's 1997 districting plan was a racial gerrymander insofar as it "substantially maintained the borders of previous plans" from 1991, 1993, and 1995 in which race had allegedly predominated. 206 F.3d at 513. The Fifth Circuit explained that, although "evidence of intent garnered from [those] prior plans" was relevant, "the state of mind involved in the prior plans [was] not of itself what is precisely and directly the ultimate issue before the [c]ourt in this case." *Id.* at 521. Rather, the court recognized that the "state of mind of the reenacting body" controls the analysis, and observed that the "intervening reenactment with meaningful alterations may render the current law valid" even if the prior law was unconstitutional. *Ibid.* The court also applied a "presumption in favor of the Council's good faith," *id.* at 520, and ultimately found that race had not predominated either in 1997 or in the prior years at issue.

The district court also invoked *Kirksey* v. *Board of Supervisors*, 554 F.2d 139 (5th Cir.) (en banc), cert. denied, 434 U.S. 968 (1977), which reasoned that the "benign nature" of a new redistricting plan "cannot insulate the redistricting government entity from the existing taint" of a prior "intentional and purposeful discriminatory denial of access." *Id.* at 146-147; see C.J.S. App. 33a n.34, 45a. But *Kirksey* dates from the pre-*City of Mobile* era in which the Fifth Circuit had concluded that a constitutional vote-dilution claim could be proven by *either* discriminatory purpose *or* discriminatory effects. Cf. *Jones* v. *City of Lubbock*, 727 F.2d 364, 369, 377-378 (5th Cir. 1984) (describing history). And to the extent "th[e] [*Kirksey*] court determined that a [constitutional] voting dilution case did not necessarily require intent where a political system demonstrably continued the effects of historical discrimination," the Fifth Circuit later rejected that approach, recognizing that a constitutional vote-dilution claim must "satisfy the purpose standard generally applicable in equal protection cases." *Id.* at 377.

2. In imposing a legal obligation on the Legislature to "ensure that the 2013 plans cured any taint from the 2011 plans," C.J.S. App. 40a, the district court also effectively shifted the burden of proof to Texas. As explained above, the burden rests on the "plaintiff[s]" to "establish that the State * * * acted with a discriminatory purpose." *Bossier Parish*, 520 U.S. at 481. Although the court did not expressly state that it was shifting the burden of proof, its conclusions that "[t]he discriminatory taint was *not removed by the Legislature's* enactment of the Court's interim plans," C.J.S. App. 46a (emphasis added), and that "the *Legislature did not engage* in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans," *id.* at 40a (emphasis added), rest on the evident assumption that it was the State's obligation to disprove discriminatory intent in 2013 rather than plaintiffs' obligation to prove it.[14] In shifting that burden, the district court overrode the strong "presumption of good faith" that the State's enactments should have enjoyed in these circumstances. *Miller*, 515 U.S. at 916; see p. 27, *supra*.

The district court suggested that, absent a burden on Texas to show it has "removed" its prior bad intent, the 2013 plans would be "insulate[d]" from challenge and plaintiffs would have "no remedy" for any "discrimination or unconstitutional effects" in those plans. C.J.S. App. 44a-45a & n.45. That is incorrect: plaintiffs here could have attempted to prove their case in the same

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[14] The district court's burden-shifting was invited by some plaintiffs, who argued that the "State has the burden [in the litigation] to prove that its chosen remedy cures all of the defects found by the Court" in the 2011 plan. D. Ct. Doc. 1525, at 49 (July 31, 2017) (MALC post-trial brief); see *id.* at 21, 40-42.

way as all other similarly situated plaintiffs in redistricting cases—namely, by establishing that the *2013 Legislature* enacted the *2013 plans* for impermissible racial purposes. And to do that, because the Legislature adopted court-ordered remedial plans, plaintiffs should be required to adduce particularly persuasive evidence in order to surmount the presumption that the Legislature acted lawfully. But the possibility that a legislature might act with nefarious motives in enacting a court-approved plan cannot justify relieving plaintiffs of their burden to show that those motives exist.[15]

### C. This Court Should Reject The Basis For The District Court's Findings Of Intentional Discrimination

It was only by relying on the flawed premises described above that the district court reached its conclusion that the 2013 plans were the unlawful product of intentional discrimination. Although the determination of legislative motive is a "factual question," *Hunt*, 526 U.S. at 549, this Court retains "full power to correct a court's errors of law," including any "legal mistake[s]" underlying factual findings. *Cooper*, 137 S. Ct. at 1464-1465, 1474; see *LULAC*, 548 U.S. at 427 ("Where 'the ultimate finding of dilution' is based on 'a misreading of the governing law' * * * there is reversible error.")

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[15] The district court's "insulat[ion]" concern also reflects its conflation of the concepts of discriminatory *intent* and unlawful vote-dilutive *effect*. Although success on plaintiffs' intentional vote-dilution claims would require proof that the 2013 Legislature acted for a discriminatory purpose, plaintiffs' Section 2 "results" claims require no such showing. See pp. 4-5, *supra*. Thus, as Texas has acknowledged, the fact that a re-enacting legislature does not act with unlawful intent does not foreclose the possibility that "impermissible discriminatory *effect* may be carried over * * * from one version of a law to another." C.J.S. 17.

(quoting *Johnson* v. *De Grandy*, 512 U.S. 997, 1022 (1994)). This Court should correct those legal errors.

***1. Application of a strong presumption of good faith is appropriate in this case***

The circumstances of this case confirm the soundness of applying a strong presumption that the Legislature did not act with an impermissible racial purpose in adopting the 2013 redistricting plans.

First, the 2013 Legislature enacted plans that were either identical (for the congressional plan) or nearly identical (for the State House plan) to the interim plans that the district court ordered to be used for the 2012 elections. A legislature's adoption, entirely or substantially without amendment, of plans that have received judicial approval indicates the legislature's reliance on the district court's factual and legal determinations that those plans are likely lawful.

Second, in approving the 2012 interim plans, the district court expressly considered each of plaintiffs' challenges under this Court's *Perry* decision and concluded that they either were "insubstantial" or had no "likelihood of success." *Perry*, 565 U.S. at 394-395. The three-judge district court's approval of the districts that were unchanged from the 2011 plan to the 2012 interim plan was based on extensive evidentiary proceedings, including a ten-day trial in 2011; a three-day hearing in 2011 regarding the first set of interim maps; a two-day hearing in 2012 concerning the revised set of interim maps on remand from *Perry*; and the court's review of post-trial briefing from the nine-day preclearance trial in the D.C. district court. C.J.S. App. 380a. The district court's evaluation of plaintiffs' claims under *Perry*, and its determination that the 2012 interim plans were law-

ful under that standard, gave the Legislature good reason to believe that the court's 2012 interim plans were a lawful basis for the 2013 plans.

As to the congressional plan, the district court found that CD27 likely did not violate Section 2 of the VRA because the court had restored CD23 as a Latino opportunity district. C.J.S. App. 421a. With respect to CD35, the court found that race had not predominated in its creation and that the district would not fail strict scrutiny in any event. *Id.* at 409a-415a. The court likewise stated that in preserving the unaltered districts in the State House plan, it was "following the Supreme Court's direction to leave undisturbed any district that is free from legal defect." H.J.S. App. 303a (citing *Perry*, 565 U.S. at 393-394). The court thus adopted the 2012 interim plans only after considering, albeit preliminarily, the merits of all pending VRA and constitutional challenges.

Third, the district court's 2012 interim plans made numerous ameliorative changes to other districts, which supported the Legislature's conclusion that the interim plans had likely cured any defects in the 2011 plans. The interim congressional plan made significant changes to nine congressional districts, which included restoring CD23 as a Latino opportunity district. C.J.S. App. 417a-421a. The court concluded that the restoration of CD23 "substantially addresse[d]" any Section 2 violation involving Latino voters in South and West Texas, including those residing in Nueces County (CD27). *Id.* at 421a. After that change, there were at least eleven congressional districts in the 2012 interim plan in which minority voters had the opportunity to elect their candidates of choice, as opposed to only ten such districts in the 2011 plan. *Id.* at 297a, 399a.

Similarly, in the interim State House plan, the district court made "substantial[]" changes to 21 State House districts. H.J.S. App. 314a. The number of minority opportunity districts in the State House plan was thereby increased from 45 or 46 in the 2011 map to at least 50 in the 2013 map. See 11-cv-1303 Docket entry No. 79-2, at 8 (D.D.C. Oct. 25, 2011) (comparing numbers in 2011 map to those in benchmark pre-2011 map); H.J.S. App. 308a-309a (noting that 2012 interim plan "offset" any "retrogression" in the 2011 plan).

Fourth, the court-ordered 2012 plans were created as compromise maps acceptable to both the State and to several plaintiffs. C.J.S. App. 6a, 368a; see D. Ct. Doc. 660 (Feb. 16, 2012) (joint advisory filed by defendants and by the Texas Latino Redistricting Task Force plaintiffs proposing interim congressional plan); D. Ct. Doc. 668 (Feb. 21, 2012) (same for interim State House plan).[16] That some (although not all) plaintiffs approved of the interim plans further supports the reasonableness of the Legislature's belief that those plans were lawful.

***2. Neither the district court nor plaintiffs' filings to date in this Court have identified sufficient evidence to rebut the strong presumption of good faith***

The district court's orders and the plaintiffs' jurisdictional-stage filings in this Court do not point to evidence that would be sufficient to rebut the strong

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[16] Although the Texas Latino Redistricting Task Force plaintiffs had alleged that the 2011 State House and congressional plans "dilut[ed] Latino voting strength statewide," D. Ct. Doc. 68, ¶ 21 (July 25, 2011), those plaintiffs brought no challenges to the 2013 congressional plan, and as to the 2013 State House plan those plaintiffs challenged only a single district (HD90, which was modified in 2013 from the district court's interim plan). C.J.S. App. 12a-13a.

presumption of good faith that applies to the 2013 Legislature's re-adoption of the unchanged districts from the district court's interim plan. The district court relied on its assessment that the "Legislature did not adopt the [2012 interim] plans with the intent to adopt legally compliant plans free from discriminatory taint," C.J.S. App. 40a, but rather as a "litigation strategy designed to insulate the 2011 or 2013 plans from further challenge," *id.* at 41a. Plaintiffs endorse that rationale in their filings in this Court. See 17-586 Mot. to Dismiss 12, 21 n.9; 17-626 MALC Mot. to Dismiss 29. But those assertions appear not to rest on evidence, but rather on a misunderstanding of the law.

To the extent Texas adopted the 2013 plans with a view to resolving existing litigation against the 2011 plans, it is unclear why the district court regarded that strategy as inherently pernicious. An intent to end litigation, without more, is not an intent to discriminate. Indeed, the best way to end litigation is to adopt a redistricting plan that complies with the Voting Rights Act and the Constitution. And if a federal court has provisionally determined that a particular action is unlawful and imposes an interim remedy, and if a legislature permanently adopts that remedy in lieu of continuing to contest the lawfulness of the original action, the State's acceptance of the judicial plan presumptively furthers—not frustrates—Congress's goal in enacting the VRA of ameliorating unlawful discrimination.

Moreover, even when a State replaces a judicial remedy without fully adopting it, this Court's decisions require that federal courts treat such plans with deference. See pp. 28-29, *supra*. It follows that a State that enacts a court-approved plan in order to obviate a need for litigation concerning prospective compliance should

receive, at a minimum, the same deference. Were the law otherwise, every state legislative remedy undertaken against the backdrop of redistricting litigation would be presumptively improper, in contravention of this Court's "presumption of good faith" for state legislative enactments, *Miller*, 515 U.S. at 915, and its encouragement of state legislative remedies, *Wise*, 437 U.S. at 540 (principal opinion). Cf. *Ricci* v. *DeStefano*, 557 U.S. 557, 581 (2009) (recognizing value of "voluntary compliance" in Title VII context).

In any event, the district court did not identify the evidence that it believed supported its assertion that the 2013 Legislature acted with an intent to discriminate rather than an "intent to adopt legally compliant plans." C.J.S. App. 40a. Rather, the court's statement appears to rest on its mistaken belief that the Legislature was under an affirmative obligation to undertake a "deliberative process to ensure that the 2013 plan cured any taint from the 2011 plans," *ibid.*, and an ensuing inference that the Legislature's failure to discharge that obligation was proof of ill motive. But to the extent that the 2013 Legislature relied on the district court's legal and factual judgments rather than second-guessing them, such reliance is more naturally understood as a sign of good faith. Indeed, the Legislature's refusal to adopt significant changes is consistent with a legislative intent to avoid creating (even inadvertently) new violations of the VRA.

The district court also cited evidence that the Legislature's counsel, Jeff Archer, advised legislators that the district court's 2012 findings were preliminary and therefore not "full determinations" on the merits of every claim. C.J.S. App. 43a; see 17-586 Mot. to Dismiss 21 (relying on same evidence). But the district court's

orders on the 2012 interim plans were, at a minimum, highly relevant in assessing Texas's legal obligations and the likely merits of plaintiffs' claims. The fact that the Legislature knew that the court-ordered interim maps were not based on a final adjudication of plaintiffs' claims concerning the 2011 plans, and yet adopted those maps anyway, can quite reasonably be understood as reflecting the Legislature's judgment that the court-ordered maps provided the best evidence available as to what remedial plans would comply with federal law.[17] But in any event, the non-final nature of the district court's determinations underlying its interim plans is not, without more, affirmative evidence of discriminatory intent.

The district court also observed that the 2013 Legislature had "steadfast[ly] refus[ed]" to consider the possibility of drawing new "coalition" districts, which the district court had earlier found "could be required" by the VRA. C.J.S. Pet. App. 40a; cf. p. 10 n.5, *supra*. But the Legislature may have believed that the necessary factual predicate, including proof of cohesive voting among Hispanic and African-American voters, did not exist to require drawing new coalition districts. This Court had stated in *Perry* that if the district court, in adopting its 2011 interim plans, had set out to create a

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[17] Texas's post-trial briefing before the district court cited several pieces of record evidence consistent with this understanding. See, *e.g.*, JX-10.4 at 26 (Representative Drew Darby, Chairman, House Select Committee on Redistricting) ("[T]he interim maps represent the District Court's best judgment as to * * * fully legal and constitutional redistricting plans."); JX-13.4 at 151 (Representative Travis Clardy, Member, House Select Committee on Redistricting) ("[I]nterim means interim, I understand that, but it's a good, fair map drawn by three hard-working impartial federal judges who are very well acquainted with the law. Don't you think it's reasonable that * * * we use those maps?").

minority coalition district, "it had no basis for doing so." 565 U.S. at 399. The district court also did not include any new coalition districts in its 2012 interim plans. And the district court ultimately rejected plaintiffs' claims that the Legislature should have created additional coalition districts in 2013. See H.J.S. App. 7a, 9a-12a, 14a, 16a, 20a-22a, 24a-26a, 85a; C.J.S. App. 49a-51a, 53a-85a.

Finally, the district court noted that the 2013 Legislature "pushed the redistricting bills through quickly in a special session," C.J.S. App. 40a, which began on May 27, 2013, and ended on June 25, 2013. But the Governor convened a special session only because the Legislature had ended its regular session in May 2013 without any new redistricting plans to replace the 2011 plans, for which the D.C. district court had denied preclearance. And because the Legislature sits in regular session for only 140 days every two years, see Tex. Const. art. III, §§ 5(a), 24(b), a special session was necessary if the Legislature was to adopt new redistricting plans before the 2014 elections. The "quick[ness]" of the special session may reflect only that "no [special] session shall be of longer duration than thirty days." *Id.* § 40.

## III. THE DISTRICT COURT ERRED IN CONCLUDING THAT CONGRESSIONAL DISTRICT 35 IS AN UNCONSTITUTIONAL RACIAL GERRYMANDER

A. This Court applies a two-step analysis in determining whether a State has violated the Equal Protection Clause through racial gerrymandering. At the first step, plaintiffs must prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without" a particular district. *Alabama Legislative Black Caucus* v. *Alabama*, 135 S. Ct. 1257, 1267 (2015) (citation omitted). At the second step, the burden shifts to the State to

"prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper*, 137 S. Ct. at 1464 (quoting *Bethune-Hill*, 137 S. Ct. at 800). When a State invokes compliance with the Voting Rights Act as the "compelling interest" justifying its race-based apportionment, it must show that it had "'good reasons'" for concluding that its actions were required by the VRA. *Ibid.* (quoting *Alabama*, 135 S. Ct. at 1274).

B. The district court erred in finding a racial gerrymander in CD35. As an initial matter, the 2013 Legislature adopted CD35 in its present form in 2013 because that district had received judicial endorsement in the court-ordered interim congressional plan. Thus, the "predominant" consideration in establishing the boundaries of CD35 in 2013 was that they matched the district provisionally deemed lawful by the three-judge court.

In any event, the State had "good reasons" to believe that the VRA required it to draw CD35 in 2011 and maintain it in 2013. *Cooper*, 137 S. Ct. at 1464. The district court's own decision in 2012 concluded that Texas had good reasons for drawing CD35 as it did. Although the district court provisionally concluded in 2012 that race did not predominate in drawing the district, it also found that "[p]laintiffs [had not] demonstrated a substantial likelihood that CD35 would fail a strict scrutiny analysis [even] if strict scrutiny applies." C.J.S. App. 415a. The court noted that Texas had defended CD35 in the preclearance proceedings as a "minority opportunity district," *id.* at 411a, and it observed that CD35 had been designed to have a "Hispanic majority" with "'above 50 percent of [Hispanic citizen voting age population],'" *ibid.* (citation omitted). Indeed, the court counted CD35 among the seven "Latino opportunity

districts" that it perceived as necessary to satisfy plaintiffs' Section 2 "results" claims in South and West Texas. *Id.* at 409a. Although the district court's approval of CD35 in 2012 was provisional, that endorsement provided at least "breathing room" for Texas to conclude, in 2013, that CD35 addressed a VRA need and that maintaining it would not violate the Equal Protection Clause. *Cooper*, 137 S. Ct. at 1464 (citation omitted).

In addition to the district court's endorsement of CD35 in 2012, there were other "good reasons" for Texas to believe that Section 2 of the VRA required drawing CD35 as a Hispanic-majority district. It is uncontested that Section 2 required no fewer than seven Latino opportunity districts in South and West Texas. C.J.S. App. 112a & n.85, 126a-127a, 176a. And the State had reason to believe that CD35 would satisfy *Gingles*; mapdrawers and members of the Legislature in 2011 were aware of substantial Hispanic populations in Austin and San Antonio, and were furnished with analyses of racially polarized voting (RPV) showing information about polarization statewide and in each district, including District 35. See C.J.S. Supp. App. 67a-69a, 201a, 366a, 467a-469a, 481a-482a. Indeed, one group of plaintiffs proposed and supported the creation of CD35 as "an appropriate § 2" Latino opportunity district during the 2011 redistricting process. C.J.S. App. 174a; see C.J.S. Supp. App. 158a (describing CD35 as a "[n]ew Hispanic VRA district"); C.J.S. Supp. App. 152a, 316a-317a, 319a-320a.

C. The district court's ruling that CD35 failed "strict scrutiny review" because it was "not narrowly tailored to the State's professed interest in avoiding § 2 liability," C.J.S. App. 113a, 177a, rests on misunderstandings of

Section 2's requirements, the trial record, and the strict-scrutiny standards articulated by this Court.

As explained (pp. 4-5, *supra*), to make a prima facie showing of vote dilution under Section 2, a plaintiff must prove, *inter alia*, that the majority group would vote "sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." *Thornburgh* v. *Gingles*, 478 U.S. 30, 51 (1986) (citation omitted). The district court concluded that that precondition could not be met for CD35 because "[e]vidence from county-level elections" in Travis County "shows substantial Anglo crossover voting," such that "the Anglo majority does not usually defeat the minority-preferred candidate." C.J.S. App. 175a. But only a small share (21%) of the total population of Travis County is included in CD35. *Id.* at 181a. The district court did not address whether voting patterns were racially polarized within the particular portion of Travis County included in CD35, nor did it address whether voting patterns were racially polarized across CD35 as a whole (*i.e.*, including both areas inside and outside Travis County). And the district court cited no precedent in support of its apparent assumption that a State necessarily lacks good reasons to draw a Section 2 district any time that a district includes (or, as here, partially overlaps with) a community in which racial polarization is not apparent. To the contrary, this Court has recently reaffirmed that "the basic unit of analysis for racial gerrymandering claims * * * is the district," and has stated that "[c]oncentrating on particular portions [of the district] in isolation may obscure the significance of relevant districtwide evidence." *Bethune-Hill*, 137 S. Ct. at 799-800.

Applying a "holistic analysis," *Bethune-Hill*, 137 S. Ct. at 800, the record confirms that it would be inappropriate

to deem CD35 an improper Section 2 district solely because of a purported lack of racially polarized voting in Travis County. See D. Ct. Doc. 681-3, at 7 (Feb. 28, 2012). The total population of CD35 is 698,488. *Ibid.* The total Hispanic population of CD35 is 438,819 persons, more than two-thirds of whom reside outside Travis County. *Ibid.* The total Anglo population of CD35 is 175,726 persons, nearly three-quarters of whom reside outside Travis County. *Ibid.* Within CD35, the Anglo population from Travis County is only 45,272 persons. *Ibid.* Thus, even assuming a showing that Anglos in the covered portion of Travis County did not engage in racially polarized voting, that would fail to establish that Anglos districtwide would not vote so as "usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. And it is uncontroverted that racially polarized voting existed throughout the counties making up the majority of CD35. See C.J.S. App. 21a (stating that the existence of racially polarized voting outside Travis County was "essentially undisputed" and "supported by all the expert testimony in the case").

In any event, even if the absence of racially polarized voting in Travis County meant that CD35 was not *required* to be drawn as a Section 2 district, the district court erred in finding that CD35 failed strict scrutiny for that reason. This Court's precedents afford a State "'breathing room' to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Cooper*, 137 S. Ct. at 1464 (citation omitted). Here, because the State had, at a minimum, "good reason to think that all the '*Gingles* preconditions' [were] met," "so too it ha[d] good reason to believe that § 2 require[d] drawing a majority-minority district." *Id.* at 1470.

## CONCLUSION

For the foregoing reasons, the Court should reject the bases for the district court's findings of intentional discrimination as to eight unchanged districts (CD27, HD32, HD34, HD54, HD55, HD103, HD104, and HD105), and it should reverse the finding of a racial gerrymander as to the remaining unchanged district (CD35).

Respectfully submitted.

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